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OPINION AFTER TRANSFR FROM THE CALIFORNIA SUPREME COURT

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re HOWARD ARMSTRONG on Habeas Corpus.	D051629 (San Diego County Super. Ct. No. HC18110)

Appeal from an order of the Superior Court of San Diego County, George W. Clarke, Judge. Affirmed.

Howard Armstrong was sentenced in 1988 to a prison term of 17 years to life after a jury found him guilty of second degree murder with a firearm. Armstrong, now 53 years old, has remained in prison for more than 20 years. After several parole hearings at which parole was denied, the Board of Parole Hearings (BPH) found him suitable for parole at his 2006 suitability hearing, at which it concluded Armstrong did not pose an unreasonable risk of danger to society if released. However, Governor Arnold Schwarzenegger (the Governor) reversed the BPH's decision, finding Armstrong posed

an unreasonable risk of danger to society if released. Armstrong successfully petitioned the trial court for a writ of habeas corpus. Ben Curry, acting warden of the Correctional Training Facility (Curry), appealed the trial court's order granting Armstrong's petition for a writ of habeas corpus and his release from prison on parole, arguing Governor Schwarzenegger's decision was supported by some evidence and therefore must be upheld.

In an unpublished opinion filed June 2, 2008, this court affirmed the trial court's order and ordered Armstrong released under the conditions set forth in the 2006 decision of the BPH. (*In re Armstrong* (Jun. 2, 2008, D051629) [nonpub. opn.].) However, the California Supreme Court granted review and deferred further action in this matter pending order of the court, and subsequently transferred the matter to this court with directions to vacate our prior decision and reconsider the matter in response to *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*) and *In re Shaputis* (2008) 44 Cal.4th 1241 (*Shaputis*). The parties have filed supplemental briefs following transfer to this court. (Cal. Rules of Court, rules 8.200(b) & 8.528(f).) After further consideration, we again conclude the Governor's decision was not supported by some evidence, and therefore affirm the trial court.

I

FACTS

A. The Commitment Offense

In 1986, Armstrong was a drug dealer. The victim, Mr. Sanders, was one of Armstrong's customers. On multiple occasions, Sanders had defaulted on his drug debts

to Armstrong and Armstrong had threatened Sanders by pointing a gun at Sanders's head. On one occasion, Armstrong pointed an unloaded gun at Sanders's head, pulled the trigger, and said "I'm going to kill you like this."

On October 24, 1986, Armstrong went to Sanders's apartment with a loaded gun. Sanders's body was discovered that morning with a near-contact gunshot wound to the forehead. Armstrong admitted he fired the lethal shot. One witness told police the witness had spoken with Armstrong after the shooting and Armstrong admitted that he had gone over to the apartment to "take care of [Sanders]" and had done so. Another witness told police Armstrong stated he had "some trouble" with Sanders and went to Sanders's apartment to "rough [Sanders] up but [he] got cocky" and "I lost my temper and I hurt him pretty good." Armstrong's defense claimed the shooting was an accident. Armstrong's defense version was that he went to Sanders's apartment and found a note attached to the front door demanding Sanders pay a debt owed to others. He entered the apartment with his gun drawn, found the apartment had been ransacked, and located Sanders. An argument ensued, and Sanders jumped up as though to attack Armstrong. In response, Armstrong swiped his gun hand at Sanders to fend him off. The gun fired once and killed Sanders.

Armstrong was 31 years old at the time of the murder. A jury convicted him of second degree murder, with a true finding on the use of a firearm allegation, and Armstrong was sentenced to a prison term of 17 years to life.

B. Armstrong's Performance in Prison

Armstrong has remained discipline free during his incarceration in prison. In addition to his unblemished discipline record, he furthered his vocational training through numerous programs, became involved in the Alcoholics Anonymous and Narcotics Anonymous programs, and consistently received laudatory reviews from prison staff. His numerous psychological reports during the past few years have been favorable and stated his potential for violence on parole was no greater than that of the average citizen in the community.

C. Other Suitability Factors

Armstrong has marketable skills, realistic parole plans, and available support from his family and his stable marriage. Armstrong had no prior criminal record. At the time of his offense, Armstrong was undergoing significant stress in his life, including the loss of his job and the break-up of a long term relationship associated with his drug use.

II

HISTORY OF PROCEEDINGS

A. The Prior BPH Proceedings

Armstrong's minimum eligible parole date was in 1998. Although he apparently had several hearings before the BPH during the following eight years, the BPH found him unsuitable for parole at each of those hearings.

At his 2006 parole hearing, the BPH considered Armstrong's testimony at the hearing, as well as the written reports, and concluded he was suitable for parole. The BPH relied on his realistic parole plans and marketable skills, his demonstrated

commitment to sobriety, his remorse and insight into his behavior, his maturation and conduct during the previous 18 years, and other considerations to find he did not pose an unreasonable risk of danger to society if released on parole.

In November 2006 the Governor reversed the BPH's decision because he found Armstrong posed an unreasonable risk of danger to society if released. The reason given for this finding was that the crime was especially aggravated because it involved some premeditation. The Governor found the "gravity of the murder perpetrated by Mr. Armstrong presently outweighs the positive factors [and] I believe [Armstrong's] release would pose an unreasonable risk of danger to society at this time." The Governor's decision also mentioned Armstrong had not yet secured a job offer, and finding a way to financially support himself would be essential to his success on parole. Additionally, the Governor stated "[a]lthough Mr. Armstrong says he is remorseful and accepts responsibility for his actions, he maintains that the shooting was an accident."

B. The Habeas Proceedings

Armstrong petitioned the San Diego County Superior Court for a writ of habeas corpus, alleging the Governor's reversal of the BPH's decision violated his due process and equal protection rights because the Governor's unsuitability determination was not supported by the evidence, was arbitrary and capricious, and was incorrectly based solely on the facts of his offense. The trial court issued an order to show cause, and invited the Governor in his return to articulate " 'why [Armstrong's] underlying crime continues to make him an unreasonable risk to public safety.' " The trial court, concluding that neither the original decision nor the return to the order to show cause answered this inquiry,

found the Governor's decision was not supported by some evidence. Accordingly, the trial court vacated the Governor's decision and reinstated the BPH's grant of parole.

Curry appealed from the trial court's order, arguing the Governor's decision was supported by some evidence. In our unpublished opinion, we concluded the Governor's decision reversing the BPH's order violated due process because the Governor's finding that Armstrong posed an unreasonable danger if released was contrary to the only reliable evidence of his current dangerousness. (*In re Armstrong, supra,* D051629.) The California Supreme Court, then considering *Lawrence* and *Shaputis,* granted review and deferred any action pending further order of the court. After issuing its decisions in those cases, the Supreme Court transferred this matter back to this court with directions to vacate our prior decision and reconsider the matter in light of *Lawrence* and *Shaputis.*

III

LEGAL STANDARDS

A. The Parole Decision

The decision whether to grant parole is a subjective determination (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 655 (*Rosenkrantz*)) that should be guided by a number of factors, some objective, identified in Penal Code section 3041 and the BPH's regulations. (Cal. Code Regs., tit. 15, §§ 2281, 2402.) The Governor's decision to affirm, modify, or reverse the decision of the BPH is based on the same factors that guide the BPH's decision (Cal Const., art. V, § 8, subd. (b)), and on "materials provided by the parole authority." (Pen. Code, § 3041.2, subd. (a).) "Although these provisions contemplate that the Governor will undertake an independent, de novo review of the

prisoner's suitability for parole, the Governor's review is limited to the same considerations that inform the Board's decision." (*Rosenkrantz,* at pp. 660-661.)

In making the suitability determination, the BPH and Governor must consider "[a]ll relevant, reliable information" (Cal. Code Regs., tit. 15, § 2402, subd. (b); hereafter, reference to section 2042 refers to the regulations), including the nature of the commitment offense and behavior before, during, and after the crime, the prisoner's social history, mental state, criminal record, attitude towards the crime and parole plans. (§ 2402, subd. (b).) The circumstances that tend to show *unsuitability* for parole include that the inmate: (1) committed the offense in a particularly heinous, atrocious, or cruel manner;[1] (2) possesses a previous record of violence; (3) has an unstable social history; (4) has previously sexually assaulted another individual in a sadistic manner; (5) has a lengthy history of severe mental problems related to the offense; and (6) has engaged in serious misconduct while in prison. (§ 2402, subd. (c).) A factor that alone might not establish unsuitability for parole may still contribute to a finding of unsuitability. (§ 2402, subd. (b).)

Circumstances tending to show *suitability* for parole include that the inmate: (1) does not possess a record of violent crime committed while a juvenile; (2) has a stable

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1 Factors that support the finding that the crime was committed "in an especially heinous, atrocious or cruel manner" (§ 2402, subd. (c)(1)), include the following: (A) multiple victims were attacked, injured, or killed in the same or separate incidents; (B) the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; (C) the victim was abused, defiled, or mutilated during or after the offense; (D) the offense was carried out in a manner that demonstrates an exceptionally callous disregard for human suffering; and (E) the motive for the crime is inexplicable or very trivial in relation to the offense.

social history; (3) has shown signs of remorse; (4) committed the crime as the result of significant stress in his life, especially if the stress had built over a long period of time; (5) committed the criminal offense as a result of battered woman syndrome; (6) lacks any significant history of violent crime; (7) is of an age that reduces the probability of recidivism; (8) has made realistic plans for release or has developed marketable skills that can be put to use upon release; and (9) has engaged in institutional activities that indicate an enhanced ability to function within the law upon release. (§ 2402, subd. (d).)

These criteria are "general guidelines," illustrative rather than exclusive, and "the importance attached to [any] circumstance [or combination of circumstances in a particular case] is left to the judgment of the [BPH]." (*Rosenkrantz, supra,* 29 Cal.4th at p. 679; § 2402, subds. (c), (d).) The endeavor is to try "to predict by subjective analysis whether the inmate will be able to live in society without committing additional antisocial acts." (*Rosenkrantz,* at p. 655.) Because parole unsuitability factors need only be found by a preponderance of the evidence, the Governor may consider facts other than those found true by a jury or judge beyond a reasonable doubt. (*Id*. at p. 679.)

B. Standard for Judicial Review of Parole Decisions

In *Rosenkrantz,* the California Supreme Court addressed the standard for a court to apply when reviewing a parole decision by the executive branch. The court first held "the judicial branch is authorized to review the factual basis of a decision of the [BPH] denying parole . . . to ensure that the decision comports with the requirements of due process of law, but that in conducting such a review, the court may inquire only whether some evidence in the record before the [BPH] supports the decision to deny parole, based

on the factors specified by statute and regulation." (*Rosenkrantz, supra,* 29 Cal.4th at p. 658.) *Rosenkrantz* held that the same standards of review are applicable when a court reviews a Governor's decision reversing the BPH. (*Id*. at pp. 658-667.)

In *Lawrence,* the Supreme Court noted its decisions in *Rosenkrantz* and *In re Dannenberg* (2005) 34 Cal.4th 1061, and specifically *Rosenkrantz's* characterization of the "some evidence" standard as extremely deferential and requiring "[o]nly a modicum of evidence" (*Rosenkrantz, supra*, 29 Cal.4th at p. 677), had generated confusion and disagreement among the lower courts "regarding the precise contours of the 'some evidence' standard." (*Lawrence, supra*, 44 Cal.4th at p. 1206.) *Lawrence* explained some courts interpreted *Rosenkrantz* as limiting the judiciary to reviewing whether "some evidence" exists to support an unsuitability factor cited by the BPH or the Governor, and other courts interpreted *Rosenkrantz* as requiring the judiciary to review whether "some evidence" exists to support "the core determination required by the statute before parole can be denied--that an inmate's release will unreasonably endanger public safety." (*Lawrence, supra*, 44 Cal.4th at pp. 1207-1209.)

The *Lawrence* court, recognizing the legislative scheme contemplates "an assessment of an inmate's *current* dangerousness" (*Lawrence, supra,* 44 Cal.4th at p. 1205), resolved the conflict among the lower courts by clarifying that the analysis required when reviewing a decision relating to a prisoner's current suitability for parole is "whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety, and not merely whether some evidence confirms the existence of certain factual findings." (*Id*. at p. 1212.) *Lawrence*

clarified that the standard for judicial review, although "unquestionably deferential, [is] certainly . . . not toothless, and 'due consideration' of the specified factors requires more than rote recitation of the relevant factors *with no reasoning establishing a rational nexus between those factors and the necessary basis for the ultimate decision*--the determination of current dangerousness." (*Lawrence,* at p. 1210, italics added.) Indeed, it is *Lawrence's* numerous iterations (and variants) of the requirement of a "rational nexus" between the *facts* underlying the unsuitability factor and the *conclusion* of current dangerousness that appear to form the crux of, and provide the teeth for, the standards adopted in *Lawrence* to clarify and illuminate "the precise contours of the 'some evidence' standard." (*Id.* at p. 1206.)

The implementation of a "rational nexus" standard finds confirmation in *Lawrence's* numerous references to that standard or to functional equivalents of that standard. For example, in at least two other places in the opinion, *Lawrence* reiterated the requirement that there be a "rational nexus" between the facts relied on by the Governor and the conclusion of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at p. 1213 [suggesting court applied inappropriate standard when it affirmed denial of parole "without specifically considering whether there existed a rational nexus between those egregious circumstances and the ultimate conclusion that the inmate remained a threat to public safety"] & p. 1227 ["mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability"].)

Additionally, other critical passages in *Lawrence* reinforce the requirement of some rational connection between the facts relied on and the conclusion of dangerousness. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1211 ["If simply pointing to the existence of an unsuitability factor and then acknowledging the existence of suitability factors were sufficient to establish that a parole decision was not arbitrary, and that it was supported by 'some evidence,' a reviewing court would be forced to affirm any denial-of-parole decision linked to the mere existence of certain facts in the record, even if those facts have *no bearing* on the paramount statutory inquiry"], italics added.)

Indeed, *Lawrence's* "rational nexus" requirement is echoed by its repeated references to a slightly different variant of that concept: whether the factor relied on by the Governor is "probative" of current dangerousness. (See, e.g., *Lawrence, supra,* 44 Cal.4th at p. 1212 [factors will "establish unsuitability if, and only if, those circumstances are probative to the determination that a prisoner remains a danger"], p. 1214 ["the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety"], & p. 1221 ["the relevant inquiry for a reviewing court is not merely whether an inmate's crime was especially callous, or shockingly vicious or lethal, but whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record"].) Because

evidence is "probative" only when it has some "tendency in reason to prove" the proposition for which it is offered (see, e.g., *People v. Hill* (1992) 3 Cal.App.4th 16, 29, disapproved on other grounds by *People v. Nesler* (1997) 16 Cal.4th 561, 582, fn. 5), the *Lawrence* court appears to have employed the terms "rational nexus" and "probative" interchangeably.

After clarifying the applicable standard of review, *Lawrence* turned to and specifically addressed how one "unsuitability" factor--whether the inmate's commitment offense was done in a particularly heinous, atrocious, or cruel manner--can affect the parole suitability determination and, in particular, whether the existence of some evidence supporting the Governor's finding that the offense was particularly heinous, atrocious, or performed in a cruel manner is alone sufficient to deny parole. *Lawrence* concluded that after there has been a lengthy passage of time, the Governor may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are *other* facts in the record, such as the prisoner's history before and after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221.)

IV

ANALYSIS

Curry does not dispute that the evidence on all relevant suitability factors, as well as the only evidence on most of the unsuitability factors, uniformly militated in favor of finding Armstrong suitable for parole. In this evidentiary context, the Governor

nevertheless found Armstrong was unsuitable based primarily on the Governor's conclusion that the commitment crime showed Armstrong remained a danger to society if released on parole. Because we are charged with the obligation to ensure this decision comports with the requirements of due process of law, and we can only discharge that obligation if we are satisfied there is some evidence in the record before the Governor providing a rational nexus between the evidence and the conclusion of current dangerousness (*Lawrence, supra*, 44 Cal.4th at pp. 1211-1212), we examine the articulated grounds to determine if some evidence supports the Governor's decision.

In the present case, paraphrasing *Lawrence*, "[a]lthough the Governor alluded to other possible grounds for denying petitioner's parole, he expressly relied only upon the nature of petitioner's commitment offense to justify petitioner's continued confinement, because [the Governor ruled that] 'the gravity [of Armstrong's crime is] alone . . . sufficient . . . to conclude presently that [Armstrong's] release from prison would pose an unreasonable public-safety risk.' " (*Lawrence, supra,* 44 Cal.4th at p. 1222.) We believe the Governor's express limitation of his finding regarding "current dangerousness" to reliance on the circumstances of Armstrong's crime would justify our similarly limiting our review to that factor. However, because the Governor alluded to one other fact in his decision, and again paraphrasing *Lawrence*, "[b]efore evaluating the Governor's reliance upon the gravity of the commitment offense, we first consider his discussion of facts not related to the circumstances of the commitment offense" (*ibid.*) mentioned in the Governor's decision reversing the BPH's grant of parole to Armstrong.

"*Lack of Realistic Parole Plans*"

Curry, although not explicitly resurrecting the argument on remand, had previously argued the Governor properly relied on Armstrong's lack of a current job offer to conclude he posed a current danger to society. Even assuming this argument was explicitly raised, we would reject this claim for several reasons. First, the Governor's mention of the absence of a current job offer was included within the Governor's recitation of the "various positive factors" he considered. We thus interpret this reference to be a caveat to Armstrong's development of marketable skills, *not* a factor on which the Governor relied to conclude Armstrong was currently dangerous.[2] Moreover, this statutory factor focuses on whether the prisoner has "made realistic plans for release or has developed marketable skills that can be put to use upon release" (§ 2402, subd. (d)(8)), not on whether an employer has tendered a job offer to a person whose availability is problematic. Because the BPH found both that Armstrong had "realistic parole plans" (based on the offers of shelter and support from family members with whom he had maintained strong ties) as well as "ample marketable skills," and the

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2 Specifically, the Governor's discussion of the factors making Armstrong suitable for parole noted Armstrong's discipline-free history in prison, his maintenance of close family ties while in prison, his favorable psychological reports, his participation in numerous self-help programs such as AA and NA, his vocational training, and the jobs he held in the textile and culinary departments in prison. The Governor then stated that "Mr. Armstrong also made plans upon his release to live with family in Contra Costa County . . . . Even though [Armstrong] has marketable skills, he has not secured a job offer in Contra Costa County. Having a legitimate way to provide financial support for himself immediately upon release is essential to Mr. Armstrong's success on parole." After the above recitation, the Governor then articulated the reason he believed Armstrong was unsuitable for parole.

Governor did not dispute either finding, this factor supports rather than undermines Armstrong's suitability for parole.

Most importantly, as *Lawrence* repeatedly emphasized, there must be some rational nexus between the fact found and the conclusion that Armstrong would pose a danger to society if released. We cannot perceive any rational nexus between the fact that Armstrong would need to engage in job-hunting on his release and the conclusion that such job-seeking meant Armstrong was a danger to society. The only *evidence* was that Armstrong would not on release be destitute because it was undisputed he had an offer of shelter and financial support to assist his transition while he sought work. Because he had developed marketable skills and his institutional behavior showed he was an excellent worker, and every other consideration showed an unblemished record of rehabilitative strides, the fact Armstrong would be required to seek work after being released is not "probative to the determination that [he] remains a danger" if released on parole. (*Lawrence, supra,* 44 Cal.4th at p. 1212.) We conclude, as did the *Lawrence* court, the noncommitment offense factor adverted to in the Governor's decision--even if the Governor had specifically relied on it--lacks the requisite "rational nexus" to the *conclusion* of current dangerousness.

"*Circumstances of the Offense*"

The only *articulated* ground for finding Armstrong posed an unreasonable risk of danger to society if paroled was that the crime was especially aggravated because it involved some premeditation. We acknowledge, as did *Lawrence* (*Lawrence, supra,* 44 Cal.4th at p. 1224), that the Governor's finding the commitment offense involved

premeditation is supported by some evidence, and therefore the crime arguably was more heinous, atrocious, or cruel than the minimum elements for second degree murder. However,

> "[a]s noted above, . . . few murders do not involve attendant facts that support such a conclusion. As further noted above, the mere existence of a regulatory factor establishing unsuitability does not necessarily constitute 'some evidence' that the parolee's release unreasonably endangers public safety. [Citation.] Accordingly, even as we acknowledge that some evidence in the record supports the Governor's conclusion regarding the gravity of the commitment offense, we conclude there does not exist some evidence supporting the conclusion that petitioner *continues* to pose a threat to public safety." (*Id.* at p. 1225.)

Here, as in *Lawrence*, the BPH found all of the factors listed in the regulations supporting suitability for release on parole (except for the age and battered spouse factors) militated in favor of suitability. As in *Lawrence*, the BPH recognized Armstrong's long-standing involvement in self-help, vocational, and educational programs; his insight into the circumstances of the offense; his acceptance of responsibility and remorse; and his realistic parole plans. As in *Lawrence*, Armstrong had no prior criminal record of violent crimes or assaultive behavior or any juvenile record, and showed no evidence of an unstable social history. (*Lawrence, supra,* 44 Cal.4th at pp. 1193, 1225.) As in *Lawrence,* Armstrong's psychological examinations had been uniformly positive for many years, finding him psychologically sound and presenting no unusual danger to public safety should he be released. As in *Lawrence*, Armstrong had been free of serious misconduct for over two decades of incarceration, and exhibited exemplary efforts toward rehabilitative programming. Finally, as in

Lawrence, the BPH found no evidence establishing the existence of any other statutory factor, apart from the commitment offense, relevant to an inmate's suitability for parole. (*Id*. at pp. 1225-1226.)

Curry argues the Governor found, contrary to the BPH's finding, Armstrong had neither accepted responsibility nor shown remorse for the crime, because the Governor stated Armstrong "maintains that the shooting was an accident. . . . [¶] I do not accept Mr. Armstrong's version of events." Curry is correct that the *Lawrence* court noted in its companion case that, when an inmate shows he or she lacks insight or understanding of his or her conduct or does not accept responsibility "despite years of therapy and rehabilitative 'programming', [there is] some evidence in support of the Governor's conclusion that petitioner remains dangerous and is unsuitable for parole." (*Shaputis, supra,* 44 Cal.4th at p. 1260, fn. omitted.) However, as *Lawrence* explained (*Lawrence, supra,* 44 Cal.4th at pp. 1211, 1214, 1221) and *Shaputis* echoed (*Shaputis*, *supra*, 44 Cal.4th at pp. 1254-1255), when there has been a lengthy passage of time, the Governor may continue to rely on the nature of the commitment offense as a basis to deny parole only when there are *other* facts in the record, including the prisoner's history after the offense or the prisoner's current demeanor and mental state, that provide a rational nexus for concluding an offense of ancient vintage continues to be predictive of current dangerousness. In *Shaputis*, the court expressly stated the commitment offense remained predictive because "the record . . . [demonstrates] petitioner *still* claims the shooting was an *accident.*" (*Id*. at p. 1260.) Thus, *Shaputis* found some evidence of *current*

dangerousness existed when the commitment offense was considered in light of the petitioner's *current* attempt to deny or minimize responsibility for the crime.

Here, contrary to the suggestion in the Governor's decision that Armstrong "*maintains* that the shooting was an accident," Curry cites no evidence in the record (and we can discern none) supporting a conclusion Armstrong *currently* lacks remorse for or is deflecting responsibility for his crime. To the contrary, the only evidence before the BPH, which it credited, was that Armstrong *did* accept responsibility and show remorse for the crime. Armstrong expressly told the BPH, "I take full responsibility for everything that has happened . . . . There is no one to blame in this case but me. Not drugs, not alcohol, not [the victim], no one but me. I could never take away the pain that I have caused this family. And for that, I am truly sorry." The Governor's only cited basis for finding Armstrong "*maintains* that the shooting was an accident" is that, 20 years earlier, Armstrong's defense was based on a claim of accident. Certainly, to paraphrase *Lawrence*, Armstrong's claim of accident *in 1988* would permit the Governor "to conclude that the prisoner was a danger to the public *at or around the time of his or her commission of the offense.*" (*Lawrence, supra,* 44 Cal.4th at p. 1219.) However, the record is devoid of any evidence Armstrong *currently* lacks remorse or claims it was an accident, rendering *Shaputis* irrelevant here.

Here, a significant period of time (over 20 years) passed between the crime and the parole hearing. The evidence is also uncontroverted that, during these two decades, Armstrong committed no other violent offense, either before being incarcerated or during his more than 20 years of incarceration. Indeed, during his time in prison, he did not

commit a single infraction of prison rules that might have suggested any lingering inability to conform his behavior to the requirements of society. Instead, there is uncontroverted evidence of Armstrong's rehabilitative efforts while incarcerated, including his long-standing commitment to sobriety to obviate a principal causative factor in his single violent episode.

The trial court and the BPH concluded, and we agree, that given the lengthy passage of time and the gains made by Armstrong in prison, his 1986 crime does not in itself provide some evidence to support the conclusion he remains a danger today, which is the only basis articulated in the Governor's decision for concluding Armstrong remains dangerous. Under these circumstances, we adhere to our Supreme Court's instruction in cases like the present one that, although:

> "[o]ur deferential standard of review requires us to credit the Governor's findings if they are supported by a modicum of evidence. [Citation.] This does not mean . . . that evidence suggesting a commitment offense was 'especially heinous' or 'particularly egregious' will eternally provide adequate support for a decision that an inmate is unsuitable for parole. As set forth above, the Legislature specifically contemplated both that the Board 'shall normally' grant a parole date, and that the passage of time and the related changes in a prisoner's mental attitude and demeanor are probative to the determination of current dangerousness. When, as here, all of the information in a postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety, and the Governor has neither disputed the petitioner's rehabilitative gains nor, importantly, related the commitment offense to current circumstances or suggested that any further rehabilitation might change the ultimate decision that petitioner remains a danger, mere recitation of the circumstances of the commitment offense, absent articulation of a rational nexus between those facts and current dangerousness, fails to provide the required 'modicum of evidence' of unsuitability. [¶] Accordingly, under the circumstances of the present case--in which the record is

> replete with evidence establishing petitioner's rehabilitation, insight, remorse, and psychological health, and devoid of any evidence supporting a finding that [he] continues to pose a threat to public safety--petitioner's due process and statutory rights were violated by the Governor's reliance upon the immutable and unchangeable circumstances of [his] commitment offense in reversing the Board's decision to grant parole." (*Lawrence, supra,* 44 Cal.4th at pp. 1226-1227.)

Conclusion

We conclude, under the standards adopted by *Lawrence* and the application of those standards to facts substantively indistinguishable from the facts in *Lawrence,* the Governor's decision is not supported by some evidence and therefore violated Armstrong's due process rights.

DISPOSITION

The judgment of the trial court is affirmed.

McDONALD, Acting P. J.

I CONCUR:

McINTYRE, J.

O'Rourke, J., dissenting.

I respectfully dissent. Under the deferential standard set forth by our state's high court in *In re Dannenberg* (205) 34 Cal.4th 1061 and *In re Rosenkrantz* (2002) 29 Cal.4th 616, clarified by *In re Lawrence* (2008) 44 Cal.4th 1181 (*Lawrence*), there remains a sufficient factual basis in the record – "some evidence" – to support Governor Schwarzenegger's conclusion that releasing Armstrong on parole would pose an unreasonable risk to society at this time.

In my view, the majority downplays the Governor's findings in support of his decision that Armstrong presently remains a threat to public safety. While the Governor concluded that the gravity of the murder Armstrong committed was alone sufficient to support his decision, the Governor also recited other factors apart from the circumstances of the crime – evidence pertaining to Armstrong's "past and present attitude toward the crime" (Cal. Code Regs., tit. 15, § 2402, subd. (b)) – that, combined with the dispassionate and calculated nature of Armstrong's act, is enough to demonstrate Armstrong's present dangerousness. Further, the Governor found Armstrong has not secured a job, leaving himself without a realistic means to provide financial support for himself which was "essential to Armstrong's success on parole." These facts, which are supported by evidence in the record or of which we may take judicial notice, are "*probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." (*In re Shaputis* (2008) 44 Cal.4th 1241, 1255 (*Shaputis*), quoting *Lawrence, supra*, 44 Cal.4th at p. 1221.)

In this case, the record considered by the Governor shows that Armstrong, a drug dealer who had previously pointed an unloaded gun at the victim's head and threatened to kill him over drug debts ("I'm going to kill you like this"), took a loaded gun into the victim's residence and shot him in the head; the victim's death was caused by a "near-contact gunshot wound to the left forehead, one-half inch above the medial border of the left eyebrow and three-quarter inch to the left of the midline." Thus, the victim was shot near the middle of his forehead at extremely close range, and the type and manner of injury permit the Governor to characterize the incident as a dispassionate, cold, and calculated "execution-style" killing. This, combined with Armstrong's prior multiple threats to the victim, and a witness statement in a probation officer's report that Armstrong stated he had gone to the victim's apartment to "take care of him" and that he woke the victim and "took care of him," shows that Armstrong's crime was committed "in an especially heinous, atrocious or cruel manner." (Cal. Code Regs., tit. 15, § 2402, subd. (c)(1)(B).) Armstrong's crime reflects "exceptional callousness and cruelty" to the victim. (*Dannenberg*, *supra*, 34 Cal.4th at p. 1098.)

This case meets the "some evidence" standard of *Lawrence*, *supra*, 44 Cal.4th 1181, as a result of the additional circumstance that Armstrong maintains the crime was an accident and has never repudiated his position.[1] In his most recent 2004 and 2006

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1 In his habeas petition, Armstrong adopted a "Summary of the Commitment Offense" reflecting his position that the victim's death was the result of an accidental shooting during an altercation between him and the victim: " 'On October 24, 1986, Armstrong, a drug dealer, arrived at the victim's place of residence and attached to the front door was a note that read, quote, 'If we don't get our money, we're going to kill you.'

parole suitability hearings, Armstrong declined to address the facts of the case, stating, "The facts of this case will never change."[2] The record, while indicating Armstrong has accepted "responsibility for everything that happened" and was sorry for the family's loss and pain, does not show Armstrong appreciates or admits the *nature or magnitude of his actions*. In my view, it shows Armstrong has not expressed complete remorse, and reflects an absence of understanding or appreciation of the gravity or nature of his offense, because he never acknowledges his motivation for the murder. His *current* attitude, showing a present lack of insight into his role in and the nature of his heinous crime years after it was committed, is a factor showing Armstrong is presently not

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end quote. Inside, the living room area was ransacked. Armstrong proceeded into the living room area with his revolver in his gun hand. Armstrong located the victim in another room. Both went into the living room area. An argument ensued between the victim and Armstrong. As Armstrong attempted to leave the area the victim jumped up. Simultaneously, Armstrong swiped at the victim using his right gun hand, causing the revolver to fire one shot that struck the victim near the middle of the forehead. Armstrong ran out of the victim's residence, leaving behind his car keys.' " Armstrong's 2006 parole consideration hearing reflects that this was essentially the version Armstrong gave to his correctional counselor in February 1997, except Armstrong told the counselor he was on "speed," causing him to act irrationally.

2 In 2004, Armstrong's statement to the Board of Parole Hearings (Board) was as follows: "With respect for this Board and to the family, I would not like to talk about this case. The facts of this case will never change. I take full responsibility for everything that happened in this case. There is no one to blame in this case but me, not Bobby, not drugs, and not alcohol, but me. No matter what I say, I will never take away the pain and the loss that I have caused this family and for that I am truly sorry." In 2006, the statement was almost identical, though Armstrong indicated to the Board he was reading from a letter. In his April 2007 traverse to the return to his habeas petition, Armstrong stated he "[d]enies [t]he implication that the murder was premeditated and that he took a loaded gun to the victim's residence for the purpose of killing him," though he admitted being an active drug dealer and going to the victim's residence for the purpose of collecting money owed to him, he stated the record did not demonstrate he carried the gun for the specific purpose of killing anyone.

suitable for parole in that he remains a danger to the public. As such, the Governor's decision is supported by some evidence in the record, and the trial court's order should be reversed.

Shaputis, *supra*, 44 Cal.4th 1241 presents similar facts that compel this conclusion. The petitioner in *Shaputis*, who was 71 and had several chronic health problems at the time of the high court's opinion, was convicted of the second degree murder of his wife in 1987 and sentenced to 15 years to life in prison. (*Shaputis*, *supra*, 44 Cal.4th at p. 1245.) Like the present case, the record in *Shaputis* indicated the petitioner's wife was mortally wounded by a gunshot fired at close range – the petitioner's 2004 evaluation report stated the " '[e]xaminer surmised that the shot would have been fired at a close range anywhere from 1 inch to 3 feet, most likely from less than 12 to 16 inches.' " (*Shaputis*, *supra*, 44 Cal.4th at p. 1248, fn. 6.) The arrest report stated that the shot could not have been fired accidentally because to shoot the gun, one had to pull back the hammer into a cocked position to enable the trigger to function, and the gun had a bar preventing accidental discharge. (*Id*. at p. 1248.)

The petitioner was discipline free throughout his incarceration, had a long and positive work record, participated in all available Alcoholics Anonymous and Narcotics Anonymous programs since 1991, and completed all applicable therapy programs, including those for anger and domestic violence. (*Shaputis*, *supra*, 44 Cal.4th at p. 1249.) He had the lowest classification score for a life-term inmate for several years, and had received numerous commendations from prison staff for his work, conduct and reform efforts. (*Ibid*.) However, when the petitioner "was afforded an opportunity to amend his

statements at the 1997 hearing, [he] asked that his characterization of the crime remain unchanged – that is, he continued to contend that the murder was an accident." (*Id*. at p. 1250.)

Though the Board ordered petitioner paroled to San Diego County, the Governor reversed that decision on two grounds: (1) the crime was especially aggravated as involving some premeditation, and (2) the petitioner had not fully accepted responsibility for and lacked sufficient insight concerning his conduct toward the victim. (*Shaputis*, *supra*, 44 Cal.4th at p. 1253.) After a majority of this court twice granted petitioner habeas relief, the California Supreme Court reversed, holding this court did not adhere to the deferential standard of review set forth in *In re Rosenkrantz*, *supra*, 29 Cal.4th 616 and that the record revealed some evidence supporting the Governor's decision that the petitioner remains dangerous. (*Shaputis*, at p. 1255.) The court explained the deferential review standard as follows: "As we stated in *Rosenkrantz* . . . the Governor's interpretation of a documentary record is entitled to deference. [Citation.] Although 'the Governor's decision must be based upon the same factors that restrict the Board in rendering its parole decision' [citation], the Governor undertakes an independent, de novo review of the inmates suitability for parole. [Citation.] Accordingly, the Governor has discretion to be 'more stringent or cautious' in determining whether a defendant poses an unreasonable risk to public safety. [Citation.] When a court reviews the record for some evidence supporting the Governor's conclusion that a petitioner currently poses an unreasonable risk to public safety, it will affirm the Governor's interpretation of the

evidence so long as that interpretation is reasonable and reflects due consideration of all relevant statutory factors." (*Shaputis*, 44 Cal.4th at p. 1258.)

Applying that standard, the *Shaputis* court concluded some evidence supported the Governor's decision that the petitioner remains dangerous. First, the record supported the Governor's determination the crime was "especially aggravated *and*, importantly, that the aggravated nature of the offense indicates that petitioner poses a current risk to public safety." The court distinguished the circumstances from those in *Lawrence*, *supra*, 44 Cal.4th 1181: "This is not a case, like *Lawrence* . . . in which the commitment offense was an isolated incident, committed while petitioner was subject to emotional stress that was unusual or unlikely to recur. [Citation.] Instead, the murder was the culmination of many years of petitioner's violent and brutalizing behavior toward the victim, his children, and his previous wife." (*Shaputis*, *supra*, 44 Cal.4th at p. 1259.) Moreover, the record established "that although petitioner has stated that his conduct was 'wrong,' and feels some remorse for the crime, he has failed to gain insight or understanding into either his violent conduct or his commission of the commitment offense. Evidence concerning the nature of the weapon, the location of ammunition found at the crime scene, and petitioner's statement that he had a 'little fight' with his wife support the view that he killed his wife intentionally, but as the record also demonstrates, petitioner *still* claims the shooting was an *accident.* This claim, considered with evidence of petitioner's history of domestic abuse and recent psychological reports reflecting that his character remains unchanged and that he is unable to gain insight into his antisocial behavior despite years of therapy and rehabilitative 'programming,' all provide some evidence in support of the

Governor's conclusion that petitioner remains dangerous and is unsuitable for parole." (*Id*. at p. 1260.)

Here, as in *Shaputis*, the record shows both an extremely cold, calculated, premeditated killing, and Armstrong's lack of insight into the nature of the crime or quality of his actions. Concededly, unlike the petitioner in *Shaputis*, Armstrong did not have a prior criminal record. However, as the majority acknowledges, his past before the offense was characterized by many years of drug use, drug dealing, and previous violent incidents involving this victim. The fact Armstrong does not presently acknowledge his motivation and role in the crime, under *Shaputis*, provides some evidence to support the Governor's decision. As in *Shaputis*, "[t]he Governor did not disregard petitioner's behavior in prison, but rather considered it to be one of several factors, although one outweighed by the gravity of the offense and petition's lack of insight into his long history of violence – factors that suggest petitioner remains a current danger to the public." (*Shaputis*, *supra*, 44 Cal.4th at p. 1261.) For this reason, I would reverse the trial court's order granting Armstrong's petition.

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O'ROURKE, J.